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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

FRANK VERDERBER, Toledo, Ohio,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Your petitioner, Frank Verderber, prays for a writ of certiorari to be issued to review the judgment of the Supreme Court of Ohio in the case entitled, *State of Ohio, Plaintiff-Appellee, vs. Frank Verderber, Defendant-Appellant,* No. 32989 in said Court.

There was no opinion rendered in the Court of Common Pleas of Lucas County, Ohio, Court of Appeals of Lucas County, Ohio, or the Supreme Court of Ohio.

JURISDICTION

The Supreme Court of Ohio dismissed the appeal of this petitioner on the 30th day of April, 1952, (Record page 271) and denied an application for rehearing of a motion for leave to appeal on the 21st day of May, 1952 (Record page 271).

The time for this court's review runs from the latter date.

On the 14th day of August, 1952, an order was granted extending time to file Petition for Writ of Certiorari to and including September 1, 1952. (Record page 276)

Subsequently, on September 1, 1952, an order was granted extending time to file Petition for Writ of Certiorari to and including October 1, 1952. (Record page 277) The jurisdiction of the court is invoked under 28 U. S. C. A. 1257(3) on the ground that the decision below deprived the petitioner of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. The cases relied upon to sustain the jurisdiction of this court are:

Tumey vs. Ohio, 273 U. S. 510, 535, decided in 1927, wherein Mr. Chief Justice Taft stated,

> "No matter what the evidence was against him he had a right to have an impartial Judge."

Lee vs. Fleming, 158 F. 2d, 984, 988, decided in 1946, wherein the Judge stated,

> " • • • the fundamental concept of due process of law that parties to controversies are entitled to have them determined by an impartial tribunal."

QUESTIONS PRESENTED

1. Is it not a deprivation of liberty within the meaning of the Fourteenth Amendment of the Constitution of the United States, for the State to call the defendant's

wife as a witness against him and permit her to give testimony to the effect that he had murdered her son, and for the court to then deny defendant's counsel the right to cross examine her or to call witnesses to refute her statement of murder?

2. While a wife can testify against her husband in a criminal case for an injury inflicted by him upon her, is it not a deprivation without due process to permit her to testify to crimes committed against third persons unless said crimes or alleged crimes are committed in the known presence of a person competent to be a witness?

CONSTITUTIONAL PROVISIONS AND PERTINENT PARTS OF STATUTES INVOLVED

Constitution of Ohio, Article I, Section 10.

> " * * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; * * * and to have * * * a speedy public trial by an impartial jury * * * ."

Ohio General Code, Section 12420.

> "Shooting, cutting or stabbing with intent to kill, etc. Whoever maliciously shoots, stabs, cuts, or shoots at another person with intent to kill, wound or maim such person, shall be imprisoned in the penitentiary not less than one year nor more than twenty years."

Ohio General Code, Section 11494, Paragraph 3.

> "Privileged communications and acts. The following persons shall not testify in certain respects:
>
> * * * * *
>
> "3. Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done,

in the known presence or hearing of a third person competent to be a witness. The rule shall be the same if the marriage relation has ceased to exist; * * *."

STATEMENT OF FACTS

This is a criminal action based on Section 12420 of the General Code of Ohio. The defendant-appellant, Frank Verderber, was indicted by the Grand Jury of Lucas County, Ohio, in September term of 1950, on six counts of violating Section 12420 aforesaid.

Omitting the formal parts of the indictment, the first count charged the petitioner with shooting Mary Verderber with intent to kill.

The second count charged the petitioner with shooting Mary Verderber with intent to wound.

The third count charged the petitioner with shooting Rupert G. Islinger with intent to kill.

The fourth count charged the petitioner with shooting Rupert G. Islinger with intent to wound.

The fifth count charged the petitioner with shooting at Frieda Islinger with intent to kill.

The sixth count charged the petitioner with shooting at Frieda Islinger with intent to wound.

Thereafter a trial was had before the Honorable John M. McCabe, one of the Judges of the Court of Common Pleas of Lucas County, Ohio, and a jury duly impaneled for the purpose of hearing said case. Said trial was commenced on the 19th day of March, 1951, and was concluded on the 22nd day of March, 1951. At the conclusion of the trial the jury returned its verdicts in favor of the respondent, the State of Ohio, and against the petitioner on the second, fourth and sixth counts of the indictment aforesaid.

Thereafter and within the statutory period provided therefor, the petitioner filed his written motion for a new trial of said cause, which motion was overruled on the 28th day of March, 1951; judgment was rendered upon the verdict and petitioner was sentenced by the Court.

The petitioner, Frank Verderber, perfected his appeal to the Court of Appeals of Lucas County, Ohio, in accordance with the law applicable thereto, and Briefs were filed on behalf of the petitioner and the respondent. (Record pages 268 and 269) Thereafter, the case was argued in the Court of Appeals of Lucas County, Ohio, and there, after due consideration, the said Court of Appeals affirmed the judgment of the Common Pleas Court, without written opinion.

Thereafter on the 26th day of January, 1952, the judgment of the Court of Appeals aforesaid was journalized (Record page 268). The petitioner filed his application for a rehearing of this action in the Court of Appeals of Lucas County, Ohio; said application being filed within the period provided in the rules of court for the Court of Appeals of Lucas County, Ohio. Said application for rehearing was refused. Subsequently and within the statutory period a motion for leave to appeal was filed in the Supreme Court of Ohio. (Record page 269) Said proceedings being No. 32989 in that court. Said motion was denied on April 30th, 1952, and a motion to rehear the motion for leave to appeal was denied on May 21st, 1952. (Record pages 270 and 271)

No opinions were rendered by any of the Courts aforesaid.

The petitioner in his motion for leave to appeal to the Supreme Court of Ohio relied on constitutional grounds and claimed a violation of his rights under Section I of the Fourteenth Amendment of the Constitution of the United States (Record page 269).

REASONS FOR THE ALLOWANCE OF THE WRIT

Referring to question number one, of the questions heretofore presented, we direct the attention of the Court to the statements made by Mary Verderber in her direct examination as set forth on page 11 of the record, to-wit:

> "Q. And who was Stanley? A. That's my son, what he passed away about six six days before he chased me out from the house. He beat him up—he beat my son up Saturday. Wednesday, my son died."

The answer of Mary Verderber as set forth above, left the impression with the jury that Stanley Verderber died as the result of the beating which he received from Frank Verderber, the defendant in this action. The defendant undertook to refute the implied charge of murder of Stanley Verderber and we direct the Court's attention to page 198 of the record, wherein you find these statements:

> "Q. Was that after Stanley was sick? A. No, when Stanley was in the hospital, they called me up.
>
> "Mr. Rhinefort: (Prosecuting Attorney) That was after this—pardon me, I don't mean to interrupt; that was after the claim about striking Stanley?
>
> "Q. That was on Tuesday, after you seen Stanley on Saturday?
>
> "Mr. Rhinefort: Just a minute, I object, Your Honor.
>
> "Q. Where were you when Stanley became ill? A. In Canton.
>
> "Mr. Fenton: Just refuting all this stuff about the murder of Stanley.
>
> "The Court: We're not concerned about that. He's not on trial for murder.
>
> "Mr. Fenton: We're concerned about any charges—

"The Court: Let's not deviate with the case on trial. Let's confine our testimony to the case we have before us now on trial.

"Mr. Fenton: If the Court please, I think we have a right to refute anything prejudicial.

"The Court: I don't think you have. He's not charged with murder, as you claim, of Stanley, and these conversations he may have had in May with respect to Stanley's death, I don't see how it's all proper."

These latter statements were made by the petitioner, Frank Verderber, on re-direct examination and we submit that the statement of the court was indicative of an attitude of bias and prejudice which, being made in the presence of the jury, could have no other result than that of influencing the jury and conveying to them the feeling of the Court in opposition to the petitioner's case.

The attitude of the Court was further communicated to the jury by the Court's statements appearing on Page 199 of the record, to-wit:

"Q. What did you hunt deer with? A. I hunt with a 30.06, and I was going to take this gun along, because I was going to stay the full season up there.

"Q. What value does a gun like that have? A. I don't know, he said $10.00.

"Q. I don't mean that; suppose you met a bear with a gun like that? A. Sometimes a bear will step right up to you and sometimes your gun will jam—your rifle—it happens a good many times when you get excited, and you're right up against it.

"The Court: Let's not go bear hunting, but get back to November 3rd, will you, please. We're not concerned with—

"Mr. Fenton: If the Court please, he was charged—it was suggested that he was using this gun to go deer hunting, or bear hunting, and this, of course, would not be a suitable gun.

The Court: Well, he wasn't deer or bear hunting on November 3rd." (November 3rd was the date of the offense alleged in the indictment against Frank Verderber.)

The statements made by the court were clearly indicative of bias, and of necessity served to prejudice the jury against petitioner. Petitioner was therefore denied his constitutional right to be tried by an impartial jury.

Referring now to the second question of the questions heretofore presented, we find that the statements made by Mary Verderber as recited in question number one aforesaid, were made in the sole presence of Mary Verderber, Stanley Verderber and Frank Verderber. Stanley Verderber is now deceased, leaving Mary Verderber and Frank Verderber. At the time of the events referred to by Mary Verderber, she, Mary Verderber, was Frank Verderber's wife. By virtue of the Ohio General Code, Section 11494, paragraph 3, heretofore referred to, the Court, by permitting Mary Verderber to testify concerning events which took place outside the presence or hearing of third persons, competent to be witnesses, was improper and it was a deprivation of the defendant's constitutional rights.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

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